

STATE OF SOUTH CAROLINA  
COUNTY OF BEAUFORT

JON H. ATTRIDGE and JANET L ATTRIDGE, ROBERT W. BANKOV, VIRGINIA J. BANKOV, TOM BOLTON, GUY I. COLLIER, NANCY L. COLLIER, RICHARD JAY COLEMAN, MARLENE COLEMAN, RUSSELL G. DIMKE, SANDRA A. DIMKE, JAMES G. GOODWIN JR., CAROL A. GOODWIN, GEORGE J. LOVETT, WILNA W. LOVETT, PETER MARZLUFF, DEBORAH C. MARZLUFF, GARY OKEY, NANCY OKEY, MICHAEL PELLECCHIA, JANICE S. PELLECHIA, FRANK H. ROBERTS SR., RICHARD SWILPA, MICHELE GALLANT, PHYLLIS K. KAUPP-SEAS, ROBERT P. BRENDZA, and ROBIN E. BRENDZA individually and in their derivative capacity on behalf of BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION,

Plaintiffs/Counterclaim Defendants,

-vs-

THE BOARD OF DIRECTORS OF BULL POINT PLANTATION PROPERTY OWNERS ASSOCIATION, INC.; BULL POINT SC, LLC; WILLIAM E. GAVIGAN; MICHAEL CAREY; CHRISTOPHER J. QUICK; JAMES RIORDAN; DB ASTER, LLC; AND GSI, LLC,

Defendants/Counterclaimants,

and  
BULL POINT SC, LLC and WILLIAM E. GAVIGAN,

Third-Party Plaintiffs,

-vs-

IN THE COURT OF COMMON PLEAS  
FOURTEENTH JUDICIAL CIRCUIT  
CASE NO.: 2018-CP-07-02345

**ORDER**

JOSEPH P. D'AMBROSIO, MARY D'AMBROSIO, MICHAEL POWERS, HARRIET BOSIACK, ROBERT WOLFSON, JAMES HAYES, STEVE ANDREWS, RON LAMBE, DAVE PREZVYS, RIVERS REACH AT POCOTALIGO, LLC, RIVERS REACH REALTY, LLC AND JOHN DOES 1-10,

Third-Party Defendants.

This matter came before the Court on cross motions for partial summary judgment: Plaintiffs' Motion for Partial Summary as well as the Motion for Partial Summary Judgment of Defendants/Counterclaimants Bull Point SC, LLC; William E. Gavigan; Michael Carey; Christopher Quick; James Riordan and Third Party Plaintiffs Bull Point Plantation Property Owners Association, Inc.; Bull Point SC, LLC; and GSI, LLC's (hereinafter collectively "Defendants"). After considering all materials submitted by Plaintiffs and Defendants and hearing arguments, Plaintiffs' Motion for Partial Summary Judgment in GRANTED and Defendants' Motion for Partial Summary Judgment is DENIED.

### **BACKGROUND**

Plaintiffs commenced this suit individually and in their derivative capacity as property owners and members of the Bull Point Plantation Property Owners' Association (the "Association" or the "POA"), for injunctive relief and for a declaratory judgment as to the rights of the Association and its members under the Declaration of Covenants, Conditions and Restrictions of Bull Point Plantation ("Declarations"). In short, Plaintiffs contend that Defendant Bull Point SC, LLC -- which is owned by the Defendant Gavigan -- has wrongly claimed that it is the Declarant of Bull Point Plantation and assumed the Declarant's rights. Plaintiffs allege that Bull Point SC, LLC has wrongly purported to appoint all the members of the POA's Board of Directors (refusing to allow the POA members to elect the POA's Board), to name Gavigan President of the Board,

and to amend the Declarations. Plaintiffs also contend that the Defendants have breached their fiduciary duties to the POA by, among other things, invading the POA's Contingency Fund and misspending and overspending the POA's money.

In their Motion for Partial Summary Judgment, Plaintiffs seek the following declarations:

1. That under the terms of the Declarations, Defendant Bull Point SC, LLC is not the Declarant and therefore cannot exercise the Declarant's rights and that the actions taken by the Defendant as putative Declarant are invalid; and
2. In the alternative, that even if Bull Point SC, LLC is the Declarant, the South Carolina Nonprofit Corporations Act and the Bull Point Plantation governing documents provide that the members of the Association are entitled to elect the Association's Board of Directors, rather than the Directors being appointed by the Declarant and that an immediate election be held in this regard.

In their competing Motion for Partial Summary Judgment, the Defendants seek the following declarations:

1. That Defendant Bull Point SC, LLC is the Declarant; and
2. That Defendant Bull Point SC, LLC has the right to appoint and remove members of the POA's Board of Directors.

## **FACTS**

### **A. The Articles of Incorporation, the Declarations, and the Bylaws**

Bull Point Plantation is a private waterfront community located in Seabrook in Beaufort County, South Carolina. On September 26, 1995, the Bull Point Plantation Homeowners Association, Inc.<sup>1</sup> was incorporated by filing Articles of Incorporation (hereinafter "Articles") with

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<sup>1</sup> The Articles have been amended to change the name of the entity from Bull Point Homeowners Association, Inc. to Bull Point Plantation Property Owners Association, Inc.

the State of South Carolina Secretary of State. In addition to the standard Nonprofit Corporation Articles of Incorporation form, this document includes a typewritten "Articles of Incorporation, Bull Point Homeowners Association, Inc." The document contains ten articles that set out the framework of the Association. Section 6 sets out the establishment and maintenance of the Board of Directors. It lists the initial three members of the Board of Directors by name. It then proceeds to prescribe the selection of future Directors. Beginning with the first annual meeting, the members of the Association were to elect Directors in staggered terms (e.g., one Director for a one (1) year term, one Director for a two (2) year term, and one Director for a three (3) year term). By the fourth annual meeting, Bull Point Plantation POA members were supposed to be electing members of the Board of Directors every year for one (1) year terms. The Articles of Incorporation make no provision for the Declarant to appoint or remove Directors.

The Declarations were first recorded in 1995, revised in 2000, and amended numerous times thereafter. Among other things, the Declarations define "Declarant" and set out the Declarant's rights. The Declarations define "Declarant" as follows:

"Declarant" shall mean and refer to Bull Point, LLC which has executed this Declaration with respect to the Property and the Additional Property at the time of such transfer to said successor-in-title, or any party which acquires said Declarant's entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant's interest in the Property and the Additional Property.

Declarations, Section 1.01(j).

The Declarations conflict with the Articles of Incorporation in one important respect, by providing that the Declarant has the authority to appoint and remove members of the Board of Directors. The Declarations purport not to give the members the right to elect Directors until the Declarant's rights expire.

The POA's Bylaws were reputedly enacted in 1995, but they were first formally recorded on January 10, 2019 in order to comply with the new South Carolina Homeowners Association Act, S.C. Code Ann. Sec. 27-30-110 (2018) et seq. As will be discussed later, when there is any conflict between governing documents, the Nonprofit Corporations Act resolves these conflicts in favor of the Articles of Incorporation.

### **B. GSI, LLC and Bull Point SC, LLC Purchase**

The Bull Point Plantation Property Owners' Association was formed in 1995 by developer Bull Point, LLC<sup>2</sup> in Beaufort County, South Carolina. Bull Point, LLC was eventually unable to meet its financial obligations and filed for bankruptcy protection. Most of Bull Point, LLC's remaining property was foreclosed upon and sold at public auction on January 23, 2012, wherein the developer's lender, German American Capital Corporation ("GACC") submitted a successful credit bid of \$5.4 million dollars. On July 9, 2012, GACC acquired Bull Point, LLC's real estate interests in Bull Point Plantation. GACC simultaneously assigned its bid to its affiliated company, DB Aster, LLC. On December 28, 2012, Bull Point, LLC conveyed five additional lots and purported to assign its Declarancy Rights to DB Aster, LLC. The Assignment was recorded on January 8, 2013.

On or about February 23, 2016, DB Aster entered into a contract with GSI, LLC, ("GSI") a Gavigan-owned entity, to sell its remaining Bull Point Plantation property. On or about June 7, 2016, DB Aster declared GSI, LLC in default under the contract. Litigation ensued between GSI, LLC and DB Aster. The parties entered into a new contract on August 9, 2017, and the suit was dismissed on August 10. On August 21, 2017, GSI purchased the property owned by DB Aster for \$1.2 million and title was conveyed by Limited Warranty Deed. Also, on August 21, 2017 a

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<sup>2</sup> No relation to the purported Declarant Bull Point SC, LLC.

document was recorded which purported to assign the Declarant's rights from DB Aster to GSI, LLC. On the same day, GSI, LLC assigned most of its interest to Defendant Bull Point SC, LLC, of which Gavigan is also the sole member. GSI, LLC also executed an "Assignment of Rights Under Declaration" to Bull Point SC, LLC. This purported assignment differs from the previous assignments from Bull Point, LLC to DB Aster and from DB Aster to GSI, LLC, in that this assignment "specifically excludes any and all claims, demands, responsibilities, liabilities and obligations of or against Declarant, whether in tort or contract, being an expressed or implied warranty, or resulting from Assignor's acts or failures to act, and arising under the Declaration or Assignor's development activities or the exercise of control of the Bull Point Property Owners Association prior to the date hereof."

Critically, Defendant Bull Point SC, LLC did not acquire the entire interest of the original Declarant, Bull Point, LLC. In fact, it did not acquire the entire interest of the original Declarant's successor, DB Aster, LLC. It did not even acquire the entire interest of DB Aster's immediate successor in title, GSI, LLC. As noted above, DB Aster obtained Declarant Bull Point LLC's interest in the Bull Point Property in 2012. DB Aster did not sell that entire interest to GSI, LLC, however. Between July 2012 and August 21, 2017, when it sold its interest to GSI, LLC, DB Aster made a conveyance of property to the POA. It also sold at least five individual lots. Therefore, GSI, Inc. did not acquire the entire former interest of the original Declarant.

Nor did GSI, LLC convey its entire interest to the Defendant Bull Point SC, LLC. On September 1, 2017 GSI, LLC conveyed a parcel, Lot 260 of Phase V-B, "that being a portion of that same property conveyed to GSI, LLC by DB Aster, LLC ... ", to Craig Elachie, LLC. Further, GSI, LLC still owns a parcel, Lot 170 located at 87 Barnaby Bluff. Thus, Defendant Bull Point SC, LLC did not acquire the entire interest of GSI, LLC, let alone the entire interest of the

Declarant Bull Point, LLC. Of course, it did not obtain *any* interest in Bull Point Plantation pursuant to foreclosure of a mortgage, as GSI, LLC purchased its interest from DB Aster and then assigned it to Bull Point SC, LLC.

Nevertheless, since August 2017 Defendant Bull Point SC, LLC has purported to exercise Declarant's rights, among other ways by purporting to remove and appoint the members of the Board of Directors of the Association, including appointing Defendant Gavigan as President; by unilaterally purporting to amend the Declarations; and by not paying assessments on the Lots that it owns individually or through related entities.

On June 13, 2019, Plaintiffs filed their Verified Amended Complaint for Declaratory Judgment, Injunctive Relief, and Accounting. Plaintiffs allege generally, among other things, that Defendant Bull Point SC, LLC is not and never was the Declarant and that it never had the authority to appoint the POA's Board; that all actions undertaken by the appointed POA Board are null and void, including the purported amendments of the Declarations; and that the Defendants breached duties to the Plaintiffs and all other POA members by improperly spending POA funds for their own benefit. Plaintiffs asserted nine separate causes of action: (1) a Declaratory Judgment that the Defendants did not have authority to amend the Declarations, particularly to eliminate the Fifteenth Amendment to the Declarations which gave the POA's members control over the POA's Contingency/Reserve Fund, and that Defendants had no authority to use the Contingency Fund for their own benefit; (2) an Injunction prohibiting the Defendants from having control over the Contingency Fund, particularly by eliminating the Fifteenth Amendment and adopting the Eighteenth Amendment (which purported to give Defendants control over the Contingency Fund), and prohibiting the Defendants from using the Contingency Fund for their

own benefit;<sup>3</sup> (3) an Accounting of the POA; (4) failure to allow inspection of POA records under S.C. Code § 33-31-1602; (5) a Declaratory Judgment that Bull Point SC, LLC is not and never was the Declarant, making all actions it took as purported Declarant null and void, including but not limited to its amendment of the Declarations and appointments of the POA's directors; (6) a Declaratory Judgment that, regardless of who the Declarant is, the POA members have the right to elect the POA's directors and, thus, the POA's Board of Directors, as appointed by Defendant Bull Point SC, LLC is and has been illegally constituted; (7) a Declaratory Judgment that, regardless of who the Declarant is, Defendant Bull Point SC, LLC's enactment of the Eighteenth Amendment to the Declarations was improper because it was not approved by a vote of three-fourths (3/4) of the POA members in good standing; (8) a Declaratory Judgment that the POA members have the right to repeal the Eighteenth Amendment; and (9) a Declaratory Judgment that, since Defendant Bull Point SC, LLC is not and never has been the Declarant, it is responsible for paying annual assessments on the lots it owns within Bull Point since August 21, 2017, when it acquired the same.

### **STANDARD OF REVIEW**

Summary Judgment is appropriate when there is no genuine issue of material fact such that the moving party is entitled to prevail as a matter of law. Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452 548 S.E.2d 868, 874 (2001). "Where a motion for summary judgment presents a question as to the construction of a written contract, the question is one of law if the language employed by the agreement is plain and unambiguous." MCG Management of Charleston, Inc. v. Kinghorn Ins. Co., 336 S.C. 542, 546 520 S.E. 2d 820, 822 (Ct.

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<sup>3</sup> In their Amended Complaint, Plaintiffs also asked for all "injunctive relief necessary to enforce the declarations sought in the remaining Causes of Action herein; and such further injunctive relief as the Court deems appropriate."

App. 1999). “See S.C. Dep’t of Natural Res. v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299, 302-303 (2001) (stating the determination of whether a contract’s language is ambiguous is a question of law); Thalia S. ex rel. Gromacki v. Progressive Select Ins. Co., 401 S.C. 395, 399, 736 S.E.2d 863, 865 (Ct. App. 2012) (stating the construction and enforcement of an unambiguous contract is a question of law for the court and thus can be properly disposed of at summary judgment); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997) (defining an ambiguous contract as one where the terms of the contract are inconsistent on their face or are reasonably susceptible of more than one interpretation); ERIE Ins. Co. v. Winter Constr. Co., 393 S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011) (“When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect and the court must construe it according to its plain, ordinary, and popular meaning.”). “The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties *as shown by the agreement*, governs.” Forest Land Co. v. Black, 216 S.C. 255 57 S.E.2d. 420 (1950) (emphasis added).

“When cross motions for summary judgment are filed, the issue is decided as a matter of law. Wiegand v. U.S. Auto. Ass’n, 391 S.C. 159, 163, 705 S.E.2d 432, 434 (2011).” Neumayer v. Phila. Indem. Ins. Co. (S.C., July 24, 2019).

## ANALYSIS

The Court agrees with the Plaintiffs that Defendant Bull Point SC, LLC is not and never was the Declarant and that, even if it was the Declarant, the Directors of the POA should have been elected by the POA membership, not appointed by Bull Point SC, LLC. Accordingly, the Court

grants Plaintiffs' Motion for Partial Summary Judgment and denies Defendants' Motion for Partial Summary Judgment.

**I. Defendant Bull Point SC, LLC is not and never was the Declarant of Bull Point Plantation**

As stated above, the Declarations define "Declarant" as "Bull Point, LLC ... or any party which acquires said Declarant's entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant's interest in the Property and the Additional Property." Bull Point SC, LLC did not acquire any of the interest – let alone the entire interest -- of the original Declarant, Bull Point, LLC through foreclosure. GACC acquired the interest of Bull Point, LLC through foreclosure after Bull Point, LLC filed for bankruptcy. GACC then assigned its interest to its affiliate, DB Aster, LLC. DB Aster ultimately sold its remaining interest to GSI, LLC (owned by Defendant Gavigan) at arm's length for \$1.2 million, and GSI, LLC assigned its interest to Bull Point SC, LLC. Defendant Gavigan owns GSI, LLC and Bull Point SC, LLC, but neither he nor they had any relationship to GACC or to DB Aster. In fact, Bull Point SC, LLC litigated against DB Aster over the sale.

Defendant Bull Point SC, LLC did not acquire Bull Point, LLC's entire interest in the Property. After DB Aster obtained GACC's foreclosed interest, it conveyed common areas to the POA and sold at least five lots to separate individuals. Thus, DB Aster did not convey the original Declarant's entire interest to GSI, LLC. Moreover, Defendant Bull Point SC, LLC did not obtain GSI, LLC's entire interest in the remaining Property. Instead, on November 1, 2017, GSI, LLC – *after* its assignment of interests to Defendant Bull Point SC, LLC – GSI, LLC conveyed a parcel, Lot 260 of Phase V-B, to Craig Elachie, LLC, "that being a portion of that same property conveyed to GSI, LLC by DB Aster, LLC ... ." Further, GSI, LLC still owns a parcel, Lot 170 located at

87 Barnaby Bluff. Thus, Defendant Bull Point SC, LLC did not acquire the “entire interest” of GSI, LLC relating to the Property of Bull Point Plantation, let alone the entire interest of the Declarant Bull Point, LLC.

Defendant Bull Point SC, LLC acquired none of its interest in Bull Point Plantation through foreclosure of a mortgage, and it did not acquire Bull Point, LLC’s entire interest in the Property. Either of these facts alone disqualifies Bull Point SC, LLC as the Declarant as defined in Section 1.01(j) of the Declarations.

Declarant’s rights are assignable if and to the extent the declarations permit assignment. “Restrictive covenants<sup>4</sup> are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution.” Hardy v. Aiken, 631 S.E.2d 539, 369 S.C. 160 (2006). The transferability of Declarant’s rights depends on whether the Declarations make them transferable. Highlands Prop. Owners Ass’n, Inc. v. Shumaker Land, LLC, 397 S.C. 432, 437, 724 S.E.2d 685, 687 (Ct. App. 2012) is directly on point. Like this case, Highlands involved a dispute between property owners and a developer hinging on whether the developer was in fact the declarant. In deciding this issue, the Court of Appeals looked to the language of the association’s declarations and the definition of “Declarant,” which was as follows:

“Declarant” shall mean and refer to HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of Declarant to any portion of the Properties by sale or assignment of all of the interests of the Declarant in the Properties, *if the instrument of sale or assignment expressly so provides....*

724 S.E.2d at 687 (emphasis by the Court). The developer/putative declarant had acquired certain lots from the prior declarant through a deed that did not refer to or assign the declarant’s rights.

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<sup>4</sup> The Declarations are, of course, covenants. Their full title is “Declaration of Covenants, Conditions and Restrictions of Bull Point Plantation.”

The purported transfer of declarant rights occurred fourteen months later through a separate assignment document. The Association members, pointing to the fact that the deed did not expressly provide for a transfer of declarant rights, took the position that the developer/putative declarant was in fact not the declarant under the definition in the declarations. This is exactly the situation here. In applying the above definition, the Highland's Court recognized the issue as one of contract law:

“The law in this state regarding the construction and interpretation of contracts is well settled.” Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985). When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract’s force and effect. Ellie, Inc. v. Miccichi, 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004). In addition, “[w]here an agreement is clear and capable of legal interpretation, the court’s only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.” Id. (citing Heins v. Heins, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001)).

Highlands Prop. Owners Ass’n v. Shumaker Land, LLC, 397 S.C. at 437, 724 S.E.2d at 687. Applying the above principles, the Court first found the definition of “Declarant” to be unambiguous. The Court then went on to apply the definition of declarant, looking to the plain language of the definition:

We find the Covenants, when read in their entirety, support a finding that Shumaker LLC is not the Declarant. As noted previously, Article I, Section 7 of the Covenants defines Declarant as the “HIGHLANDS DEVELOPMENT LIMITED PARTNERSHIP, or any other person or entity who succeeds to the title of Declarant . . . by sale or assignment of all of the interests of the Declarant in the Properties, *if the instrument of sale or assignment expressly so provides.*” [emphasis by the Court]. HDLP, as the original Declarant under the Covenants, conveyed the property to Shumaker on July 28, 2006. The deed to Shumaker does not reference any rights held by HDLP as Declarant, nor does the deed purport to transfer any of those rights to Shumaker. Because the deed does not expressly convey the Declarant’s rights to Shumaker upon taking title to the seven lots, Shumaker does not qualify as a Declarant under Article I, Section 7 of the Covenants.”

397 S.C. at 437, 724 S.E.2d at 688. In other words, the purported assignee of the declarancy rights was not the declarant because the purported assignment agreement did not meet the requirements set out in the declaration's definition of declarant.

Defendants cite Cullen v. McNeal, 390 S.C. 470, 483, 702 S.E.2d 378, 385 (S.C. App. 2010), *cert. dismissed as improvidently granted*, 411 S.C. 270, 768 S.E.2d 401 (2015) because it permitted assignment of declarant's (there called Developer's) right, but that decision is consistent with Highlands. As it did in Highlands, the Court looked to the definition of declarant (or "Developer") contained in the declarations. In Cullen the definition of Developer recognized two different ways that the developer's rights could be transferred. The definition of Developer included a successor-in-title *or* a successor-in-interest to the original developer. The Court of Appeals held that the putative Developer qualified under the declaration's definition of Developer even though it was not the successor-in-title, because it was the successor-in-interest by assignment. By contrast, the Declaration in this case provides only one way for a successor to acquire the Declarant's rights, and Bull Point SC LLC did not acquire the rights that way. The definition requires that a successor acquire the original Declarant's entire interest by foreclosure. The Defendant Bull Point SC, LLC does not meet this requirement.

Defendants contend that the Plaintiffs should be estopped to deny that Bull Point SC, LLC is the Declarant because some of the Plaintiffs submitted affidavits in this case in which they refer to Bull Point SC, LLC as the Declarant. The Court does not find these affidavits inconsistent with the position the Plaintiffs have taken from the outset of this litigation. In the original Complaint filed on December 3, 2018 – before the subject affidavits were submitted – the Plaintiffs allege, at paragraph 3, “Defendant Bull Point SC, LLC (‘Declarant’) is a separate Limited Liability Company incorporated under the laws of South Carolina and is currently the purported declarant

of the Bull Point Plantation (although it does not meet the definition of Declarant under the Declarations).“ The affidavit references to Bull Point SC, LLC as the Declarant are consistent with the Plaintiffs’ contention in this case.

Defendants also point to various past meeting minutes and other documents in which some of the Plaintiffs referred to the assignment of the Declarant’s rights. However, those references were to DB Aster, not to Bull Point SC, LLC. Plaintiffs do not contend in this case that DB Aster did not acquire Bull Point SC, LLC’s Declarant’s rights. Recognizing DB Aster as the Declarant is not inconsistent with Plaintiffs’ contention that Bull Point SC, LLC is not the Declarant.

Finally, Defendants contend that Section 1.01(j) of the Declarations, which defines Declarant, must be read in conjunction with the rest of Declarations, which refer in various places to the Declarant’s “assigns.” These references do not conflict with the unambiguous language of Section 1.01(j), however. Section 1.01(j) does not purport to say that the Declarant’s rights are not assignable; it merely limits assignability to entities that obtain the original Declarant’s entire interest in the Property through foreclosure. It is thus possible for the original Declarant to have “assigns,” so there is nothing anomalous about referring elsewhere in the Declaration to the Declarant and its assigns.

Section 1.01(j) is clear and unambiguous in limiting the definition of Declarant to the original Declarant and “any party which acquires said Declarant’s entire interest with respect to the Property and the Additional Property at the time of such acquisition pursuant to Foreclosure of a Mortgage encumbering said Declarant’s interest in the Property and the Additional Property.” The Defendant Bull Point SC, LLC simply does not meet this definition.

The Declaration's limitation on assignability of Declarant's rights is not a mere technicality but was obviously intentional on the part of the original developer. The developer clearly did not intend for the Declarant's rights to be bought and sold as a commodity, which would threaten the very integrity of the Bull Point Plantation community. Indeed, the actions of Defendants alleged in the Amended Complaint, if proven, would exemplify the adverse consequences of freely assignable Declarant's rights.

For the foregoing reasons, the Plaintiffs are entitled to a declaration that the Defendant Bull Point SC, LLC is not the Declarant of Bull Point Plantation and that actions taken by Bull Point SC, LLC in connection with the POA Board and amendment of the Declarations are invalid.

## **II. Regardless of who was or is the Declarant, the POA members have the right to elect the POA's Board of Directors**

Even if Defendant Bull Point SC, LLC were the Declarant, its appointment of the Board of Directors was a nullity because it contravened the provisions of the Association's Articles of Incorporation and the South Carolina Nonprofit Corporations Act.<sup>5</sup>

The South Carolina Nonprofit Corporation Act of 1994 (the "Act") governs mutual benefit corporations including homeowners' associations such as the POA. Bull Point's Declarations provide – as they must -- that South Carolina law governs any conflicts in its interpretation. The Act in turn resolves conflicts among governing documents in favor of the articles of incorporation. Section 33-31-206 provides:

- (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
- (b) The bylaws may contain any provision for regulating and managing the affairs of the corporation *that is not inconsistent with law or the articles of incorporation.*

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<sup>5</sup> See: S.C. Code Ann. §33-31-10 *et seq*

The Code defines “bylaws” as, in essence, any governing document other than the articles of incorporation: “‘Bylaws’ means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation *irrespective of the name or names by which the rules are designated.*” S.C. Code Ann. §33-31-104(4) (emphasis added). The Official Comments to §33-31-104 state, “The term ‘bylaws’ has a particularly expansive definition. The term refers to the code or codes of rules, other than the articles, adopted for regulation or management of corporate affairs regardless of the name by which such rules are designated.” Accordingly, Bull Point’s Declarations are referred to as “bylaws” in the Act. The Act allows the Declarations to contain any provision for the operation of the Association that does not conflict with the law or with the Articles of Incorporation.

The Bull Point Plantation Declarations conflict with the Articles of Incorporation in one important respect. The Articles of Incorporation provide for the election of the Board members by the members of the POA, whereas the Declarations purport to allow the Declarant, during the term of the Declarancy, to appoint and remove the members of the POA’s Board of Directors. As shown in the statement of Facts above, the POA’s Articles of Incorporation provide for the annual election of members of the Board of Directors:

At the first annual meeting, the members shall elect one (1) Director for a term of one (1) year, one Director for a term of two (2) years and one (1) Director for a term of three (3) years. At each annual meeting thereafter, the members shall elect one (1) Director for a term of one (1) year.

This provision is inconsistent with the Declarations/Bylaws, which purport to allow the Declarant to appoint and remove members of the Board of Directors:

**NOTWITHSTANDING ANY OTHER LANGUAGE OR PROVISION TO THE CONTRARY IN THIS DECLARATION, IN THE ARTICLES OF INCORPORATION, OR IN THE BY-LAWS OF THE ASSOCIATION, Declarant hereby retains to right to appoint and remove any member or members of the Board of Directors of the Association by and for the term set forth in Section 8.01 hereof.**

(capitalization in original). However, the Declarations/Bylaws provide that the Act takes precedence in the event of a conflict among the governing documents:

Duties and Powers. The duties and powers of the Association shall be those set forth in the provisions of the South Carolina Code relating to non-profit corporations, this Declaration, the By-Laws, and the Articles, together with those reasonably implied to effect the purposes of the Association; provided, however, that if there are conflicts or inconsistencies among the South Carolina Code, this Declaration, the By-Laws, or the Articles, *the provisions of the South Carolina Code, this Declaration, the By-Laws and the Articles, in that order, shall prevail*, and each Owner of a Lot or Dwelling by acceptance of a deed or other conveyance thereof, covenants to vote in favor of such amendments as will remove such conflicts or inconsistencies.

(emphasis added). Thus, the Declarations expressly conform themselves to the Act, which expressly conforms them to the Articles of Incorporation. The Board of Directors of the Association must therefore be elected by the members, not appointed by the Defendant Bull Point SC, LLC.<sup>6</sup>

Accordingly, Defendants' purported appointment of the Board of Directors was a nullity and the actions of the illegally appointed Board are nullities.

#### **RELIEF GRANTED**

Based on these findings, the Court makes the following rulings and grants the following relief:

1. Plaintiffs' Motion for Partial Summary Judgment is granted;
2. Defendants' Motion for Partial Summary Judgment is denied;

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<sup>6</sup> The Act elsewhere protects the rights of members to elect their Board members. Section 33-31-804 states, "(a) If the corporation has members entitled to vote for directors, all the directors, except the initial directors, *must be elected* at the first annual meeting of members, *and at each annual meeting thereafter*, unless the articles or bylaws provide some other time or method of election, or provide that some of the directors are appointed by some other person or designated." (emphasis added).

3. Plaintiffs' request for Declaratory Judgment in its first cause of action is granted. Defendants did not have the authority to amend the Declarations to eliminate the Fifteenth Amendment and Defendants must immediately relinquish control of the Contingency Fund;
4. The injunction requested in Plaintiffs' second cause of action is granted, as it is necessary to effect the Court's declaratory judgment. Defendants are enjoined from repealing or refusing to comply with the Fifteenth Amendment of the Declarations; Defendants are enjoined from exercising any control over the Contingency Fund; Defendants are enjoined from serving on the POA's Board of Directors (unless elected by the POA members); Defendants are enjoined from taking any actions in further governance of the POA, including scheduling of an Annual Meeting or issuance of a Proposed Budget for 2020; Defendants are enjoined from occupying the offices in the POA clubhouse, and they must vacate the clubhouse offices within 24 hours of the entry of this Order; Defendants are enjoined from exercising any control over the POA funds.
5. Plaintiffs' request for Declaratory Judgment in its fourth cause of action is granted. Defendant Bull Point SC, LLC is not and never was the Declarant and, therefore, all actions it took as purported Declarant, including appointing the POA's directors and amending the Declarations, are void.
6. Plaintiffs' request for Declaratory Judgment in its sixth cause of action is granted. The POA members have and always have had the right to elect the POA's Board of Directors. The Court orders that an election will take place within 90 days of the date of this Order. Defendants shall provide the Plaintiffs with the names and every form

of contact information they have for all of the POA members. In the meantime, upon entry of this Order, the Defendants, and anyone they appointed to serve, will immediately cease acting as the POA's Board of Directors. To ensure continuity, to provide for orderly governance, to avoid harm to the Bull Point community, and to provide for administrative control over necessary POA functions, the Court appoints an interim Board of Directors consisting of five members of the POA who agree to serve. Plaintiffs are directed to provide the Court, within three days from entry of this Order, the names of the interim Directors. This interim Board of Directors will serve and have the full power and authority of the Board of Directors in accordance with the POA's governing documents and the laws of South Carolina to conduct the affairs of the POA until the POA members can elect a Board of Directors.

7. Plaintiffs' request for Declaratory Judgments in its seventh and eighth cause of action is granted. The Eighteenth Amendment to the Declarations is rescinded and the Fifteenth Amendment is reinstated, providing the POA members control over the POA's Contingency Fund.
8. Immediately upon the Plaintiffs notifying Defendants of the appointment of the interim Board of Directors, the Defendants shall turn over possession of: (a) the clubhouse offices and all property and records (both physical and electronic) located therein, including but not limited to cellular telephones and keys belonging to the POA; (b) all POA check books, credit cards, debit cards, financial records (both physical and electronic). At the same time, Defendants shall sign over to the interim Board all authority and control of all POA financial accounts and provide the interim Board all log-in credentials for all accounts as well as those needed to access the POA's

computers.

IT IS SO ORDERED!

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Carmen T. Mullen  
Presiding Judge

\_\_\_\_\_, 2019



Beaufort Common Pleas

**Case Caption:** Jon H. Attridge , plaintiff, et al VS Bull Point Plantation Property Owners Association Inc Board , defendant, et al

**Case Number:** 2018CP0702345

**Type:** Order/Other

So Ordered

s/Carmen T Mullen 2142